87-2029

PETITION NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1987 TERM OF COURT

THOMAS W. HILL,

Petitioner-Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE,
MERIT SYSTEMS PROTECTION BOARD,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Respondents-Defendants.

ON WRIT OF CERTIORARI TO THE U.S. COURT

OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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77 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit erred in Ordering complete dissolution of a preliminary injunction when the injunction has provided some appropriate relief?

2. Whether the Tenth Circuit erred in holding that provision to Plaintiff of process specified by Air Force Regulation ("AFR") 205-32 would be a "useless exercise" and may be waived when the District Court has found injury from noncompliance?

3. Whether the Tenth Circuit erred in Ordering the District Court to dismiss Plaintiff's cause, wherein he has specifically pled noncompliance with AFR 205-32?

4. Whether the Tenth Circuit erred in refusing to consider other than constitutional bases for District Court jurisdiction of the injunction, as specifically alleged in Plaintiff's complaint?

LIST OF PARTIES

All parties are listed in the caption.

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REFERENCE TO REPORTS

This petition seeks review of the 30 March 1988 Order and Judgment, Appeal No. 86-2418, Tenth Cir., reh'g denied, 11 May 1988. Appeal taken by Dept. of Air Force from preliminary injunction entered on 18 September 1986 by the U.S. District Court for the District of New Mexico.

The following are also pertinent:

Hill v. Dept. of Air Force, Appeal No. 87-2415, Tenth Cir., 11 February 1988; reh'g denied, 30 March 1988;

Hill v. Dept. of Air Force, Appeal No. 86-1081, Fed. Cir., 10 February 1987; reh'g denied, 9 March 1987;

Hill v. Dept. of Air Force, 796 F. 2d 1469 (Fed. Cir. 1986);

Hill v. U.S. Air Force, 795 F.2d 1067 (D.C. Cir. 1986), reh'g denied;

Hill v. Dept. of Air Force, MSPB Case No. DE07528510204 (11 December 1985).

GROUNDS FOR JURISDICTION

The Judgment for which review is sought (Appendix, p. 31) is dated March 30, 1988, and was entered by the Tenth Circuit Court of Appeals on that date.

Plaintiff's Petition For Rehearing was denied by the Tenth Circuit Court of Appeals by Order dated May 11, 1988. The said Order also stayed the mandate for 30 days, pending the submission of petition for writ of certiorari (Appendix, p. 56).

Plaintiff believes that 28 U.S.C. § 1254 confers upon the Supreme Court the jurisdiction to review the Tenth Circuit Judgment in question.

INVOLVED LEGAL BASES

1. U.S. Constitution. This case involves the provision of the Fifth Amendment to the Constitution of the United States, which states in pertinent part:

> "No person shall ... be deprived of life, liberty, or property without due process of law".

2. The case involves the following federal statutes, provisions of which are stated in pertinent part:

> 28 U.S.C. § 1331. Federal question; amount in controversy; costs.
>
> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."
>
> 5 U.S.C. § 702. Right of Review.
>
> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency

or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

28 U.S.C. § 1361. Action to compel an officer of the United States to perform his duty.

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff."

5 U.S.C. § 552a (g)(1) Civil Remedies.

"Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection; ...

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the in-

dividual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo."

3. Involved provisions of the following section of public law and of federal regulations are set out verbatim in the text of the Reasons for Allowance of the Writ, at the pages indicated:

STATEMENT OF THE CASE

This is a case wherein evidence admitted by the District Court at a June 1986 hearing shows that a vindictive official who had absolutely no authority under the Air Force's own controlling security regulation took[1/] an adverse security action against Plaintiff's TOP SECRET clearance, branding Plaintiff as a "thief" and as being "amoral".[2/] The official in whom the regulation vests such authority independently reviewed the matter in July 1985 and stated in his own handwriting that the adverse action was "unwarranted", that Plaintiff's 20-year security clear-

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1/ Second Amended Complaint, Ex."5",

> "[E]ffective immediately I am withdrawing your access to any and all classified materials ...
>
> Completed 0925, 24 May 1985
> Paul S. Britt [signature]".

2/ Defn. Ex. "A", 13 June 1986 District Court hearing.

ance "has not been blemished", and that "The acts attributed to Mr Hill ... did not have adverse security significance".[3/] However, the said official refused to perform his duty as specifically required by the regulation -- Air Force Regulation ("AFR") 205-32, at paragraph 8-102(e)(2), and instead attempted to use an offer to perform his duty as a bargaining chip to force Plaintiff to abandon the appeal of his removal from federal service.[4/] When Plaintiff declined to be bound on the agency's terms, the authorized official

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3/ Pl. Ex."25" (App. p. 65), 13 June 1986 District Court hearing. Injunction Finding No. 22, App. p. 10.

4/ Testimony of Bernard L. Weiss, 13 June 1986 hearing, Tr. p. 149,

"Q. But in fact my security clearance was non-negotiable, is that correct? It's a non-negotiable item. Either I could be trusted or I couldn't, is that correct?

Weiss: No, it's part of the overall settlement."

(Major General Bernard L. Weiss) refused to perform his regulatory duty, and the Chief of the Air Force Security Clearance Office (Colonel David C. Evans) refused to adjudicate the adverse security matter, even though the regulation (AFR 205-32) at paragraph 8-102 (e) requires "adjudication ... regardless of any other adverse action taken including separation". (Injunction Finding 26, Appendix, p. 11).

Plaintiff sought review of the adverse security action during appeal of his federal service removal before the Merit Systems Protection Board ("MSPB"); however, the presiding official ordered (MSPB No. DE 0752 8510204 at Tab No. 24),

> "[T]he presiding official ruled that she will not consider evidence about the suspension of appellant's security clearance because it was not the basis for the agency's removal action."

After 120 days had passed without any judicially-reviewable MSPB decision,

Plaintiff filed an amended complaint in the U.S. District Court for the District of New Mexico, claiming jurisdiction of all adverse agency actions under the Age Discrimination in Employment Act ("ADEA"), the Administrative Procedure Act, the Privacy Act, mandamus, the Fifth Amendment of the U.S. Constitution, and other bases. Following the MSPB decision's becoming judicially-reviewable in December 1985, Plaintiff simultaneously petitioned the Court of Appeals for the Federal Circuit to set aside the MSPB decision as being arbitrary and moved the District Court to permit second amendment of his complaint to include de novo review of the MSPB decision under the ADEA. District Court permission was granted in January 1986 (App. p. 59), and Plaintiff moved the Federal Circuit to transfer its review. In April 1986 the Federal Circuit denied the motion to transfer, Hill v. Dept. of Air

Force, 796 F.2d 1469 (Newman, P.), applying the age discrimination standard specifically rejected in Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), and holding that Plaintiff was bound by discrimination allegations before the MSPB, which were alleged to be "frivolous".[5/]

In February 1986 Plaintiff received an offer of employment from a defense contractor, which employment required a security clearance. Upon receipt of DD Form 48-3 as executed by Plaintiff, officials of the Defense Industrial Security Clearance Office ("DISCO") were unable to provide Plaintiff a clearance in the manner authorized by the Industrial Security Manual (DoD 5220.22-M) at paragraph 27. Injunction Finding 18 (App. p. 9); Memorandum Opinion and Order, n. 1 (App. p. 25);

5/ In an unpublished decision dated 10 February 1987, the Federal Circuit affirmed the MSPB with a single sentence.

Pl. Exs."51", "52" (13 June 1986 hearing).

In response to Plaintiff's subsequent motion the District Court conducted the June 1986 hearing and entered a preliminary injunction against the Air Force (App. p. 15). With regard to the actions taken by Defendant Britt against Plaintiff's security clearance the Court found (i) that despite Defendants' claims, the actions constituted an adverse action as defined by AFR 205-32 (Findings, App. p. 1, No. 25); "that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation" [6/] (No. 15); that "Defendants are required to adjudicate all special security files re-

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6/ In fact, Plaintiff was not provided a copy of his special security file until March 1986 (as a result of Court-Ordered discovery, District Court Dkt. No. 24c), some five months after the MSPB record had closed. He therefore did not even know the identities of his accusers, nor specifics of the charges made against him. Defn. Ex. "H", 13 June 1986 hearing.

gardless of any other action taken including separation" (No. 26); and "that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance" (No. 29). The Court further found base motives and reprisal on the part of Defendant Britt (Nos. 15, 16).

Defendants immediately appealed and moved the Tenth Circuit Court of Appeals for an emergency stay. The Appellate Court denied the motion for a stay on 27 October 1986 (App. p.17). However, on 28 May 1987 the Tenth Circuit entered an Order and Judgment (App. p.19) partially remanding the matter to the District Court for the limited purpose of allowing that Court to state the basis for its jurisdiction. The District Court conducted a hearing on 7 August 1987, and by Memorandum Opinion (App. p. 22) reaffirmed its earlier findings and conclusions, holding

that its jurisdiction was based on Plaintiff's fifth amendment rights to due process and equal protection of the laws. 7/ The Court cited 28 U.S.C. § 1331 as authorizing jurisdiction, and further noted that 28 U.S.C. § 702 allows for granting injunctive relief against the agency.

Following the Supreme Court decision in Dept. of the Navy v. Egan, No. 86-1552 (23 Feb. 1988), the Tenth Circuit en-

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7/ Plaintiff argued before the District Court and also before the Tenth Circuit that both the records amendment sections of the Privacy Act and provisions of the ADEA provided statutory bases for jurisdiction for the injunction. See Dkt. No. 56, Appeal No. 86-2418, Tenth Circuit; see also, Tenth Circuit Appeal No. 87-2415. In September 1987 the District Court dismissed the ADEA cause, giving preclusive effect to the cited Federal Circuit decision, and also dismissed the records amendment portion of the Privacy Act cause, but denied Defendants' motion to dismiss the Privacy Act damages cause. On 11 February 1988 the Tenth Circuit dismissed Plaintiff's appeal of the District Court dismissals (Appeal No. 87-2415), holding that the involved orders were not "final orders". Plaintiff's motion for rehearing was denied on 30 March 1988.

tered the Judgment and Order (App. p. 31) for which the writ of certiorari is being sought. The Circuit Court held (1) "Hill did not have a constitutional property or liberty interest in his [20-year] security clearance" (App. p. 44); (2) "the district court made no finding that the Air Force violated any particular procedure" (App. p. 49); [8/] (3) a hearing before the MSPB regarding Plaintiff's removal from the federal service is "a material intervening, and dispositive, factor ... mak[ing] a remand regarding a top secret security clearance a useless exercise" [9/]

8/ The holding is not supported by the record. Finding Nos. 15, 25, 26, App. p. 1; Memorandum Opinion n.1, App. p. 24.

9/ It is anomalous that the panel relied on Egan for teaching that neither the MSPB nor the Court may substitute its evaluation of whether Plaintiff's alleged acts had security significance for that of the responsible agency official, but nevertheless substituted its opinion for General Weiss' finding that the acts "did not have adverse security significance".

App. p. 51); (4) "Hill ... received full due process under applicable statutes and regulations" (App. p. 40). Although the Circuit Court also held (App. p. 49) that

> "[C]ourts do have the power to compel agencies to follow their own regulations",

and even though Plaintiff has specifically pled (Fourth Cause, App. p. 61),

> "1. The actions taken by the agency in suspending plaintiff's access to classified information have not conformed with the provisions of the agency's governing regulations, i.e., Air Force Regulation 205-32..."

the panel Ordered that

> "[T]he district court shall dismiss with prejudice the fourth cause of action contained in Hill's second amended complaint, dealing with his security clearance and alleged actions or omissions by the Department of the Air Force with respect thereto." [Emphasis added.]

Plaintiff timely petitioned for rehearing, or rehearing en banc, but his plea was denied on 11 May 1988 (App. p. 56). However, the Circuit Court did stay the mandate pending this appeal. Id.

REASONS FOR ALLOWANCE OF WRIT

SUMMARY

This brief shall show the following.

(1) A conflict exists among the Circuits as to whether federal employees have a right of review in District Court upon exhaustion of administrative remedy and uncontested showing of harmful non-compliance with federal regulations.

(2) The Tenth Circuit has decided the federal question of whether an agency may be relieved of regulatory obligations, in a manner which is in conflict with previous decisions of the Supreme Court.

(3) The Tenth Circuit has decided the important question of whether an individual has due process rights in a career security clearance, which matter has not been, but should be decided by this Court.

(4) There is sufficient merit in the matter to warrant review by the Court.

I. The Tenth Circuit Decision In This Matter Conflicts With Decisions In The D.C. And Eighth Circuits.

1. In a decision which should have been dispositive to the instant appeal, compelling an outcome in Plaintiff's favor, the D.C. Circuit held,

> "Courts, of course, have long required agencies to abide by internal procedural regulations concerning the dismissal of employees even when those regulations provide more protection than the Constitution or relevant civil service laws." [Emphasis added.] Doe v. U.S. Dept. of Justice, 753 F.2d 1092, 1098 (1985).

The Tenth Circuit's failure to recognize the implication of a separate liberty interest in Plaintiff's retention of his 20-year security clearance is without precedent and further opposes the D.C. Circuit. The Doe Court specifically addressed the distinction between property interest in a federal job and liberty interest in one's profession. At 1103, Id.,

> " ... [T]he fact that government employees who enjoy a property interest in continued employment might have an adequate opportunity to challenge government defamation in the constitutional remedy required to protect their property interest does not affect [additional emphasis added] the existence of an independent right of action under the liberty aspect of the due process clauses."

By contrast the Tenth Circuit has limited Plaintiff's concerns to application of civil service job procedures even though his profession as a defense systems analyst, which is surely more important than a property interest in continued Air Force employment, is at stake.

Moreover, the D.C. Circuit has noted the propriety of injunctive relief against federal officials for constitutional violations. Id., at 1109 n. 17,

> "[N]othing in Bush [v. Lucas, 462 U.S. 367 (1983)] or any other court opinion casts doubt on presumed availability of federal equitable relief against federal officials for committing constitutional violations."

2. The failure of the Tenth Circuit to recognize Plaintiff's property interest, by virtue of his compliance and support over a 20-year period, in the regulatory procedure under which adverse security actions may be taken, is in conflict with the Eighth Circuit. McIntosh v. Weinberger, 810 F.2d 1411, 1433 (1987),

> "[E]xtensive [agency] regulations governing promotion ... provided the plaintiffs with a substantial, legitimate expectation by establishing that applications for competitive placement ... were to be evaluated in accord with specified criteria and procedures ... We therefore hold that the plaintiffs had a property interest in [the agency] merit promotion system that was clearly established."

Surely Plaintiff's concerns where his security clearance is involved, and thus his chosen career field, are more important than interests of federal employees in promotion. Yet, the Tenth Circuit found no implication of interest of any type beyond former job rights.

II. The Tenth Circuit Decision To Relieve The Agency Of Responsibility To Provide Plaintiff Regulatory Process Opposes Supreme Court Holdings.

1. Supreme Court decisions have acknowledged a complainant's right to regulatory process when injury is present. Greene v. McElroy, 360 U.S. 474, 496 (1959) [notes and citations omitted],

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. ...

> The Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases ... but also in all types of cases where administrative and regulatory actions were under scrutiny."

2. There is no question that Plaintiff was injured by the agency's actions.

a. A declaration by the Deputy Director of the Defense Industrial Security Clearance Office ("DISCO") (Pl. Ex. "51", 13 June 1986 hearing) states,

> "This meant that ...[Plaintiff's] Department of Air Force security clearance could not be simply converted to a Defense Industrial Security Clearance ..."

Failure to transfer cost Plaintiff timely employment in a defense industry position and resulted in lost income. Pl.Ex. "52", Id. Plaintiff's legitimate interest in transfer is shown by the Industrial Security Manual (DoD regulation 5220.22-M),

> 27. a. "Personal Security Clearances issued by a user agency to civilian or military personnel who are U.S. citizens may be converted to industrial per-

sonal security clearances as follows:

> (3) for other civilian or military personnel separated or retired from active service -- 12 months from the time of separation or retirement from active federal service".

b. Absent District Court discovery, Plaintiff would never have known the contents of the derogatory security file. Neither would he even have known the identities of some of his accusers. Even now he has never had any opportunity to make a responsive input, or to refute criminal conduct charges made against him, or to confront certain accusers (Defn. Ex. "H", 13 June 1986 hearing). The controlling regulation (below) provides safeguards, and Plaintiff is entitled to District Court action to ensure compliance.

3. The MSPB review does not substitute on a one-for-one basis for the process provided by AFR 205-32.

a. Paragraph 8-200, AFR 205-32,

"8-200 General

No final personnel security determination shall be made on a member of the Armed Forces, an employee of the Department of Defense, a consultant of the Department of Defense, or any other person affiliated with the Department of Defense without granting the individual concerned the procedural benefits set forth in 8-201 below, when such determination results in an adverse action (see paragraph 8-100). As an exception, Red Cross/United Service Organization employees shall be afforded the procedures prescribed by DOD Directive 5210.25 (reference (u)).

8-201 Adverse Action Procedures

Except as provided for below, no adverse action shall be taken under the authority of this Regulation unless the person concerned has been given:
*(AF) Under this paragraph, actions required by 'the commander' refer to the unit commander of the individual concerned (including actions on persons in appellate leave status). [Exceptions made for persons in confinement status.]

a. A written statement of the reasons why the adverse action is being taken. The statement shall be as comprehensive and detailed as the protection of

sources afforded confidentially under the provisions of the Privacy Act of 1974 (5 U.S.C. 552a) (reference (k)) and national security permit. Prior to issuing a statement of reasons to a civilian employee for suspension or removal action, the issuing authority must comply with the provisions of Federal Personnel Manual, Chapter 732, Subchapter 1, paragraph 1-6b (reference(aa));

*a. (AF) For Air Force civilians, the issuing authority must comply with AFR 40-732. For all Air Force personnel, the statement of reasons must be included in the letter of notification from AFSCO of the intent to take adverse action, sent to the individual through the commander. This 'intent notification' is a tentative determination, dependent upon reply from the individual before a final decision is made.

b. An opportunity to reply in writing to such authority as the head of the Component concerned may designate;

b. (AF) Response to the 'intent notification' is made to AFSCO. If the letter does not contain a suspense date, it will be returned by the individual to AFSCO within 10 working days of receipt.

c. A written response to any submission under subparagraph b. stating the final reasons

> therefor, which shall be as specific as privacy and national security considerations permit; and
> c. (AF) Final decisions are sent by letter to the individual through the commander, and the decision is recorded at this time in the PDS.
>
> d. An opportunity to appeal to a higher level of authority designated by the Component concerned.
> d. (AF) Appeal of a final decision may be made in writing to the Administrative Assistant to the Secretary of the Air Force, through the AFSCO." [Emphases added].

b. The review before the MSPB did not provide any opportunity to make security clearance inputs (MSPB order, record at Tab 24); it excluded all security related evidence (such as the Weiss letter, for which the presiding official also refused to compel production); and the charges were not the same. At the MSPB hearing Plaintiff demanded that the agency prove the elements of theft against him. Black's Law Dictionary, 5th ed., p.

1324. The agency representative responded (MSPB Tr. p. 536),

> "MR HICKMAN: We contest that the agency has charged the appellant with theft."

Instead, Plaintiff was charged with "conversion" of telephone services (Id.), and there was no suggestion that he was "amoral", "unscrupulous", etc. The Tenth Circuit has now sanctioned dissemination of Britt's malicious, unchallenged charges, without any of the procedural safeguards which "due process" demands.

4. Decisions of the Supreme Court regarding the requirement on the agency to follow the dictates of its regulations could not be more lucid. See, Service v. Dulles, 364 U.S. 363 (1957),

> "[R]egulations prescribed by Secretary of State relating to loyalty and security of State Department employees were applicable by their terms and administrative interpretation to discharges under ... [the Secretary's] absolute discretion ..."

See also Service, at 372, characterizing U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, as holding that,

> "[R]egulations validly prescribed by a government administrator are binding upon him as well as the citizen, and ... this principle holds even when the administrative action under review is discretionary in nature."

See, Vitarelli v. Seaton, 359 U.S. 535, 546 (1959), (Frankfurter, J., concurring),

> "An executive agency must be rigorously held to the standards by which it professes its actions to be judged."

Against these holdings and prima facie showing of agency non-compliance with provisions of AFR 205-32, there is no legal basis for the Tenth Circuit's Ordering dismissal of Plaintiff's fourth cause, wherein he has specifically pled,

> "1. The actions taken by the agency in suspending plaintiff's access to classified information have not conformed with the provisions of the agency's governing regulations, i.e., Air Force Regulation 205-32 and other regulations, and have thus resulted in denial of due process."

III. The Tenth Circuit Ruling That Plaintiff Has No Constitutionally Guaranteed Interest In His 20-Year Security Clearance Has Decided A Matter Which Should Be Decided By The Supreme Court.

1. In its decision involving potential liberty interest of an individual in his previously-granted security clearance, the Supreme Court carefully avoided resolving the constitutional rights implications and instead based its decision on legally enforceable procedural requirements. Greene v. McElroy, 360 U.S. 474, 508 (1959),

> "Whether those [hearing] procedures under the circumstances comport with the Constitution we do not decide."

See also, Service v. Dulles, supra, wherein regulatory procedure was again held to be paramount. In Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), no liberty

interest was implicated because the involved security badge revocation neither impacted the principal's chosen career nor placed a slur her reputation.

The Supreme Court has still not resolved this due process issue for security clearance revocations. The issue was not reached in Dept. of Navy v. Egan, (No. 86-1552, 23 February 1988), since that plaintiff received the process required by regulation. Id., Opinion p. 1,

> "The narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action."

2. The Tenth Circuit has intrepidly expanded the statutory holding of Egan to all facets of a constitutional challenge, failing to discern any distinction whatsoever, even where it is recognized that the applicable regulation was not

followed. In an instance having direct applicability to the due process issues herein, Davis v. Passman, 442 U.S. 228, 241 (1979), the Supreme Court has held,

> "[T]he question who of may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.
>
> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. ...
>
> The Constitution, on the other hand, does not 'partake of the prolixity of legal code.' McCulloch v. Maryland, 4 Wheat, 316, 407 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' ibid., is the designation of rights. And in 'its great outlines,' ibid., the judiciary is clearly discernible as the primary means through which these rights may be enforced."

3. The D.C. Circuit specifically applied this distinction to a federal per-

sonnel matter wherein the involved federal employees challenged not the mechanics of an involved reduction-in-force, but rather the constitutional authority of certain supervisory officials to take actions which harmed them. Citing Mathews v. Eldridge, 424 U.S. 319 (1976), the Appellate Court held, Andrade v. Lauer, 729 F.2d 1475, 1493-94 (D.C. Cir. 1984),

> "[P]laintiffs have a right that the government act in accord with due process principles when it takes action against them, even if such conformance may not change the substantive outcome."
>
> "[W]e hold that there was a sufficient causal connection between ... appellees' alleged lack of authority ... and the injury suffered ... to easily support their standing to raise their constitutional claim."

IV. Contrary To The Circuit Court Holding Regarding Defect In The Instant Process, The Record Shows Three Substantive Procedural Violations.

1. The suspension of Plaintiff's access to classified information was an illegal action at its inception. Only the commander of Plaintiff's duty organization, i.e., Air Force Contract Management Division ("AFCMD"), was authorized to suspend the access, and the official who took the suspension action (Paul S. Britt) was not a commander.

a. Paragraph 8-102, AFR 205-32,

> "The commander of the duty organization shall determine whether ... it is in the interest of national security ... to take interim action to suspend subject's access to classified information". [Emphasis added.]

b. The adverse action was not taken by a commander.

(1) On the second page of Ex. "5" of the Second Amended Complaint, in his own handwriting Paul S. Britt has acknowledged taking the suspension action.

(2) At the 13 June 1986

hearing, Major General Bernard L. Weiss, AFCMD Commander, testified (Vol I, p.160),

> "Q. Has Paul Britt ever served as commander under you of AFCMD?
>
> WEISS: No, he's not a commander."

In addition, a memorandum from the Judge Advocate at Kirtland Air Force Base, produced by the Defendants under Court-Order (Pl. Ex."15", admitted in evidence at the 13 June 1986 hearing), states,

> " ... Suggest changing 'commanding officer' to some other appropriate phrase. Britt was & is not a commander."

2. The second procedural violation occurred when General Weiss refused to perform his regulatory duty following the staffing of the improperly-created special security file and his determination that the adverse action was unwarranted. The regulation required that General Weiss order destruction of the file, no-

tify AFSCO of his action, and request deletion of the "Pending Adjudication" code by Plaintiff's name in the AFSCO computer file. He refused to do so, and attempted instead to use performance of his duty as a negotiating item.

a. Para. 8-102.e, AFR 205-32,

> "When local actions, including UCMJ [Uniform Code of Military Justice] action, are complete, the commander must either [emphasis added],
>
> (1) (AF) Destroy the SSF according to AFM 12-50 only if the investigation findings clearly indicate, without a question of doubt, that the individual's clearance ... is not affected. ... Notify AFSCO of the findings ... and request removal of the 'Pending Adjudication' status code... or
>
> (2) (AF) Send the SSF to AFSCO ..."

b. The special security file ("SSF") was forwarded to AFSCO on 17 July 1985, without General Weiss' signature (Pl. Exs. "6", "7", 13 June 1986 hearing).

Yet, General Weiss testified,

(1) That he had been AFCMD Commander since 2 July 1985 (Tr. p. 139),

(2) That he directed on 23 July 1985 that a letter addressed to AFSCO (Col Evans) be drafted (Tr. p. 152; Pl. Exs."16", "25", admitted in evidence at the 13 June 1986 hearing) stating,

> "As the new AFCMD Commander (as of 2 Jul 85) it was incumbent upon me to carefully scrutinize all aspects of this case and to make the decision."

(3) That in his own handwriting, he had written on the draft copy (Tr. p.157; Pl. Ex."16", 13 June hearing),

> "His [Plaintiff's] security record during the past 20 years has not been blemished and withdrawal of his security clearance is unwarranted."

(4) That the letter was placed in final form by his staff on 25 July 1985, (Id.; Pl. Ex."25" App. p. 65),

(5) That the letter was

never sent to AFSCO (Tr. p.156), and that he attempted instead to use it to bargain with Plaintiff to abandon his appeal of the removal action (Tr. p. 149).

3. The third violation of the regulation occurred when, following receipt of the special security file ("SSF"), Colonel David C. Evans, AFSCO Commander, refused to adjudicate the said file; and there is positive indication that his refusal was coordinated with AFCMD. Pl. Exs. "24", "26", 13 June 1986 hearing.

a. Para. 8-405.b, AFR 205-32,

> " ... If the subject of an SSF is separated or otherwise terminated from Air Force service or employment the SSF must be disposed of [emphasis added] according to paragraph 8-102e(2)."

At para. 8-102.e(2), AFR 205-32,

> "Send the SSF to AFSCO for adjudication in all other cases ["other" referencing those resolved locally in favor of the subject] (except SCI-indoctrinated persons), regardless of any other adverse action taken, including separation. For an

> SCI-indoctrinated person...send the SSF to the MAJCOM SIO [major command SI office; Andrews Air Force Base, in Plaintiff's case] ... to HQ AFIS/INAB [Headquarters, Air Force IS/INAB directorate, Washington, D.C.] ... for joint processing with AFSCO". [Emphases added.]

At paragraphs 8-102.f and g, only two adjudication options are authorized: "favorabl[e]" and "tentative...adverse", with the latter to be followed by "procedural benefits", as defined at paragraph 8-200.

In sum, both the initial suspension of plaintiff's security clearance by Paul Britt and the referral of the special security file to AFSCO violated the provisions of the controlling regulation, AFR 205-32. Upon becoming involved and making his findings, General Weiss was obligated to order destruction of the special security file, which was a duty he owed to Plaintiff. Once the adverse file had been sent to AFSCO, whether erroneously or otherwise, the regulation obligated

the agency to dispose of the file, either favorably or unfavorably with correct process, even though Plaintiff was separated prior to adjudication. Any holding otherwise is pure sophistry.

The District Court's Injunction provided that relief and further required undoing subsequent actions, i.e., (i) entry of a Z-code by plaintiff's name in the AF SCO computer and (ii) notification to inquirers regarding the derogatory data in the AFSCO files.

V. The Tenth Circuit Erred In Refusing To Consider Alternate, Statutory Bases For Jurisdiction, As Stated In The Complaint.

1. With regard to Privacy Act matters, the District Court record shows the following.

a. By letter dated 30 June 1985, Plaintiff complained to the Com-

mander of Air Force Contract Management Division ("AFCMD") that the provisions of AFR 205-32 had not been followed, and requested him to order destruction of the special security file. Second Amended Complaint, Ex. "6", p. 1,

> "The suspension of my access to classified information was not accomplished in accordance with the provisions of AFR 205-32. Reference page 59."

At p. "2", Id.,

> "Therefore, I respectfully request that the [special security] file be destroyed as provided by the regulations."

b. Responsible agency officials reviewed[10/] Plaintiff's letter, but took no responsive action. Pl. Ex. "32",

---

10/ In the Answer to the (First) Amended Complaint (D.N.M. Dkt. No. 22, at para. 16), Defendants admitted that Plaintiff had submitted the letter to the AF CMD Commander. In their Answer to the Second Amended Complaint (D.N.M. Dkt. No. 38, para. 17), Defendants changed their minds and claimed that they did not know whether the letter had been received.

admitted, 13 June 1986 hearing (Tr. p. 5). The exhibit references Plaintiff's letter in its title.

c. The controlling federal regulation, 5 C.F.R. § 297. 102, defines the term "amendment" within the context of the Privacy Act to include destruction of records.

d. The said regulation [11] at 5 C.F.R. § 297.208(a) further requires that whenever a records amendment request is delivered to an official other than the Privacy Act monitor, that official must promptly forward the request [12] to the pro-

---

11/ At 32 C.F.R. § 806b.0, the Air Force is committed to the provisions of 5 C.F.R. § 297 for its civilian employees.

12/ Plaintiff's letter met the regulatory requirements of 5 C.F.R. § 208(b) by identifying the special security file, requesting its destruction, and providing a statement of the reasons for the request. Additional information is not required. In fact, the regulation at § 297.201(c) permits the request to be made orally. Id.

per authority.

e. Examination of the special security file (Defn. Ex. "A") shows Plaintiff's name and social security number in its title. Examination of the coordination form included with the file (Defn. Ex."H"), shows that information was retrived therefrom by numerous agency officials. Thus, the file constitutes a "system of records" within the meaning of 5 U.S.C. § 552a(a)(5).

f. The involved statute, at 5 U.S.C. § 552a(d)(2), requires the agency to make the requested amendment within ten days after receipt of a request, or alternatively, to formally deny the request and provide information reqarding administrative appeal procedures. The agency did neither.

2. The Second Amended Complaint alleges that the agency's refusal to amend Plaintiff's records is illegal.

a. At para. 11 under "Facts", Plaintiff has identified the 30 June 1985 request and has attached a copy to the Complaint.

b. Under the "Second Cause Of Action",

> "4. There is no legal basis for the agency's refusal to make the amendments requested by plaintiff, and maintenance of the records is injurious to plaintiff's professional reputation.
>
> 5. Plaintiff has exhausted administrative remedies and is entitled to judicial review of the agency's refusal to amend the records as provided by 5 U.S.C. §552a."

3. Expungement of the special security file and removal of the Z-Code from Plaintiff's name, Ordered in the form of an injunction, is precisely the relief authorized by the Privacy Act.

a. The refusal of the agency to respond to Plaintiff's amendment request of 30 June 1985 constitutes exhaus-

tion of administrative relief and estops the Defendants from pleading otherwise. See, e.g., Liguori v. Alexander, 495 F. Supp. 641 (S.D.N.Y. 1980) at 647, citing Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980), and Harper v. Kobelinski, 589 F.2d 721 (D.C. Cir. 1978).

> "Where ... [agency] failure to comply with the mandate of the Privacy Act that it inform the employee not only of its refusal to amend ... but also of procedures established by the agency to obtain a review of such refusal, the employee's suit ... was not barred on the ground that the employee failed to exhaust his administrative remedies" Id.

Defendants had ample opportunity to expunge the illegal special security file and were aware that it was continually damaging Plaintiff. Pl. Ex. "10", para. 13, 13 June 1986 hearing, admitted. However, they willfully elected not to act on the request in order to use

the threat posed by the file to their settlement advantage.

b. The relief contemplated by the Privacy Act for refusal to amend is expungement, and not merely supplement or additional administrative review. See, e.g., R.R. v. Dept. of the Army, 482 F. Supp. 770, 774 (D.D.C.1980), and Hobson v. Wilson, 737 F.2d 1, 65 (D.C. Cir. 1984).

c. The Privacy Act authorizes injunctive relief for refusal to amend records. Parks v. U.S. Internal Revenue Service, 618 F.2d 677 (10th Cir. 1980).

d. Removal of the Z-Code by Plaintiff's name in the agency's central computer is in accordance with the stated purposes of the Privacy Act. At SEC.2.(a) of Public Law 93-579 (1974),

> "The Congress finds that --
>
> ...
>
> (2) the increasing use of computers and sophisticated information technology,

> while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
>
> (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process [emphases added], and other legal protections are endangered by the misuse of certain in formation systems;
>
> ...
>
> (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenence, use, and dissemination of information by such agencies."

4. The essential point of the Privacy Act matter, which the Circuit Court refused to consider in response to Plaintiff's motion to combine appeals (see, n. 7 above) is that the Privacy Act provides

a clear statutory right of Plaintiff to portions of the relief granted by the preliminary injunction. Although the Privacy Act is complemented and reinforced by Plaintiff's constitutional right of due process, it was unnecessary for the Court to reach the issue of whether due process alone authorizes measures provided by the injunction.

VI. The Merit Of The Case Warrants Review.

1. Plaintiff's demand for equity in the Federal Court is not unreasonable.

a. In pursuit of his vendetta against Plaintiff, Britt's actions went far beyond those required for removal and were designed to interfere with Plaintiff's liberty to pursue his chosen career. (The normal security procedure for removals such as Plaintiff's is simply removal with a subsequent security debrief-

ing based upon lack of further need-to-know. Forms later executed by the employee upon an offer of defense industry employment require statements regarding the circumstances of a firing.) However, in Britt's zeal to pursue an action which he believed to be unreviewable, he set in motion a separate action for which process must be provided.

b. There was never any genuine concern for "misconduct" involving the use of government telephones. When Plaintiff learned of incremental costs associated with his calls, he tendered a check to the agency which other employees affirmed to be standard procedure. Moreover, Britt himself set the standard in Plaintiff's organization by daily calling a girl friend (New Mexico to Washington) on the office phone. At the MSPB hearing the Deputy Director, Major John G. Gowan testified (MSPB Tr. p. 645),

"MAJOR GOWAN: [Britt] discussed a wide variety of things ... [H]e talked to Washington quite often.

Q. Were they ... mostly official business?

A. ... mostly personal. ... he had many conversations with Lt Col Davidson [Sally Da- Davidson, Britt's personal friend (MSPB Tr. p.107, 111) Washington, D.C.]. I would say those [AUTOVON] calls were all personal.

Q. Were they lengthy conversations?

A. They were. ... I would say they were on the order of maybe 10 to 45 minutes each. ... a half an hour on the average.

Q. ... did he talk... about general officers?

A. I don't think I ever heard general officers mentioned. He did make, I think, many calls concerning his house ... his car, and ... building his house ..."

Under oath, Britt acknowledged these calls. MSPB Tr. p. 111,

"Q. [W]hen you talked to Ms Davidson ... have the conversations involved such mat-

ters as purchasing automobiles, building a house, even personal love affairs?

BRITT: At times the calls have had some of that as content, yes."

2. The Privacy Act provides for de novo consideration by the Court of agency refusal to destroy the special security file created on Plaintiff.

3. In addition, the Tenth Circuit Order is self-inconsistent, holding that (App. pp. 44 - 46),

> "Hill did not have a constitutional property or liberty interest in his security clearance"

on the basis of its determination that,

> "[AFR 205-32 procedures] are not the type of 'rules or understandings that secure certain benefits and that support claims of entitlement to those benefits'".

Then the Court asserts, Id., that

> "The [AFR 205-32] procedures are administrative devices which are indeed intended to promote fairness and safeguard the rights of individual employees."

CONCLUSION

In the 1985 to 1986 time period both Plaintiff and the District Court, not being descendants of the Prophetess of Thebes, relied upon available authorities for timely District Court equitable review of the vindictive actions of agency officials against Plaintiff's security clearance. The Tenth Circuit elected to await the Egan decision, then applied and expanded a statutory decision to Plaintiff's constitutional challenge, and cut off all right of review, even in the face of acknowledged agency refusal to provide Plaintiff regulatory process.

It seems clear that Plaintiff's complaint is sufficiently framed to obtain at least regulatory process. See, Doe, supra, at 1102-1104, citing 5 Wright & Miller 1357 at 602 & n. 77,

> "[I]t need not appear that the plaintiff can obtain the specific relief demanded as long as the Court can

ascertain from the face of the complaint that some relief can be granted."

However, the Tenth Circuit Order, if allowed to stand, will foreclose all review, and will become a basis for decisions adversely affecting federal employees in excess of the stated intent of Egan. For these reasons, the Supreme Court should review and reverse appropriate portions of the Order.

Respectfully submitted,

Thomas W. Hill

Thomas W. Hill, Pro Se

PETITION NO. _____

SUPREME COURT OF THE UNITED STATES

TERM OF COURT: October 1987

THOMAS W. HILL,

Petitioner-Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE,
MERIT SYSTEMS PROTECTION BOARD,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Respondents-Defendants.

ON WRIT OF CERTIORARI TO THE U.S. COURT

OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX: PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
At Albuquerque
Sep 18 1986
Jesse Casaus
Clerk

THOMAS W. HILL,

Plaintiff,

v.

Civil No.
85-1485-JB

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Defendants.

COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS MATTER having come on for a hearing on June 13 and 16, 1986, and the Court having adduced evidence, makes the following findings of fact and conclusions of law.

Findings of Fact

1. This matter comes before the Court on Plaintiff's motion for injunc-

tion wherein he seeks reinstatement of his security clearance which was revoked on or about May 24, 1985; that on that date Plaintiff had a TOP SECRET clearance with access to Sensitive Compartmentalized Information.

2. Prior to Plaintiff's removal from Federal service on July 5, 1985, Plaintiff was a Federal civil servant employed by Defendant at the GS-13 and GS-14 grade levels and assigned, from July 1973 to July 1985, to the Directorate of Aerospace Studies at Kirtland Air Force Base, New Mexico, (AFCMD/SA).

3. During almost twenty years of his employment, Plaintiff was cleared for access to claasified materials, the most recent level being TOP SECRET Sensitive Compartmentalized Information.

4. At the time of the revocation of his security clearance, Plaintiff was under the direct supervision of Colonel

Paul Britt, the Director of AFCMD/SA.

5. The tensions between Plaintiff and Colonel Britt resulted from accusations of Colonel Britt that Plaintiff had made personal telephone calls at government expense on the Directorate's AUTOVAN telephone system; that Plaintiff responded to the allegations by accusing Colonel Britt of abusing TDY funds to pursue personal interests that, thereafter, Colonel Britt brought formal charges against Plaintiff for the unauthorized calls and, further, accused Plaintiff of theft for Plaintiff's removal of personal notes abandoned by a previous Directorate employee.

6. Major John Gowan, the Deputy Director of AFCMD/SA, upon being assigned to the unit, heard rumors and references regarding Plaintiff which he deemed to be unprofessional: that the Technical Director of AFCMD/SA referred to Dr. Hill as

"Dr. Moriarty"; that Plaintiff had been singled out for adverse and disparate treatment.

7. Major John Gowan gave special attention to Plaintiff because of the way management responded to Plaintiff; that he attempted to intercede between Plaintiff and Colonel Britt in order to resolve the problems in the Directorate; that Plaintiff at all times acted professionally and made reasonable professional attempts to reconcile all differences; that Colonel Britt was unresponsive and negative in manner; that Colonel Britt was not objective and made numerous statements reflecting a vindictive attitude; that Colonel Britt used any opportunity to place Plaintiff in an unfavorable light.

8. James H. Suttle, previously a 14-year civil servant, grade GS-14, with Aerospace Studies had known Colonel Britt

since 1965 and had known Plaintiff since 1972-73; that he considered Colonel Britt a friend as well as a boss.

9. Mr. Suttle played the role of a mediator in order to diffuse tensions between Colonel Britt and Plaintiff but with no success; that he characterized Colonel Britt's management technique as that of a "threat type"; that this management style always had a "whipping boy"; and that Plaintiff was the brunt of Colonel Britt's technique.

10. Mr. Suttle testified that security clearances were used in a way to influence behavior during Colonel Britt's tenure and that of his preaecessor; that disparate treatment was common regarding sanctions imposed for security violations.

11. In acting as a mediator, Mr. Suttle informed Colonel Britt that Plaintiff would drop certain grievances which he had in an effort to mediate differ-

ences so that he could go on with his assigned duties; that this offer was refused; that Colonel Britt considered Plaintiff's grievances as a threat to Britt's authority and that Colonel Britt set out to "get him [Plaintiffl"; that Colonel Britt carried out a vendetta; and that Colonel Britt became obsessed with the "Hill problem."

12. As Major Gowan sought to act as an arbiter between Colonel Britt and Plaintiff, Colonel Britt became more alienated and informed Major Gowan that his actions in support of Hill were inappropriate; that, thereupon, Major Gowan requested to be transferred and he was subsequently transferred to the Emergency Directorate of CMD; that thereafter Colonel Britt sought means to have Major Gowan court - martialed for his having sided with Plaintiff.

13. Prior to his disaffection with

Major Gowan because of his support of Plaintiff, Colonel Britt rated Major Gowan in the highest category possible in his officer effectiveness report of June 1985.

14. According to Major Gowan, Colonel Britt wanted Plaintiff out of the Air Force and "erased from memory"; that he referred to Plaintiff as a "non-person" and stated that he would do anything to "get Plaintiff"; that the removal of Plaintiff's security clearance was a means to "eradicate" Plaintiff.

15. In retaliation for Plaintiff's charges Colonel Britt revoked Plaintiff's security clearance on May 24, 1985, asserting that the revocation was in the interest of national security and alleging that Plaintiff had acted dishonestly; established a pattern of poor judgment and unreliable behavior and was untrustworthy; that, further, Colonel Britt es-

tablished a special security file on Plaintiff; that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation.

16. Colonel Britt's actions were also motivated by Plaintiff's having filed suit against the agency in June 1984 and of his having filed grievances in the past.

17. On June 10, 1985, as a consequence of Colonel Britt's actions, the Air Force Security Clearance Office (AFSCO) placed a "pending adjudication" code by Plaintiff's name in its computer file and made that data available to all Department of Defense users; that the coded entry has prevented Plaintiff's access to classified materials until such time as the special security file on Plaintiff has been adjudicated; that as a consequence of Plaintiff's termination from Federal service, the AFSCO has refused to

adjudicate the file.

18. On July 31, 1985, AFSCO entered a "Z code" by Plaintiff's name in the AFSCO computer file; that the "Z code" indicates that Plaintiff has left the employ of the agency and that the agency possesses derogatory data regarding Plaintiff's suitability for a security clearance; that the "Z code" has damaged Plaintiff and precluded his employment in the defense community although Plaintiff's capabilities are in demand.

19. In a conversation with Mr. Suttle in Washington, D.C., Colonel Britt knew that Plaintiff was seeking other employment and acknowledged that the revocation of Plaintiff's security clearance would prevent Plaintiff from obtaining employment.

20. Mr. Suttle testified in favor of Plaintiff before the Merit Board, and as a consequence the Air Force retaliated

against Suttle.

21. John Gowan, the Deputy Director of AFCMD/SA, and Mr. James H. Suttle, testified unequivocally that Plaintiff was not a security risk.

22. In reviewing Colonel Britt's actions in revoking Plaintiff's security clearance and questioning his eligibility, General Bernard L. Weiss, Commander of the Air Force Contract Management Division, made the following findings:

a. That the acts attributed to Plaintiff did not have adverse security significance.

b. That the facts of Plaintiff's case did not indicate that Plaintiff was a threat to national security.

c. That Plaintiff's security record during 20 years of service was unblemished and the withdrawal of Plaintiff's security clearance was unwarranted.

23. John W. Dettmer, Director of

Strategic Defense Force, and prior director of the Technical Office in the Weapons Laboratory, testified of Plaintiff's excellent reputation and that Plaintiff was not a security risk.

24. In his performance evaluation by Lt. Colonel Paul J. Vallerie, Director of Aerospace Studies for the years 1982 and 1983, Plaintiff was rated as excelling in safeguarding classified information and following established security procedures.

25. Accoraing to the Department of Defense Personnel Security program, revocation of a security clearance for access to classified information is deemed to be an adverse action. Defendants' Exhibit F, p. 59, para. 8-100(a).

26. Pursuant to the Personnel Security program; Defendants are required to adjudicate all special security files regardless of any other adverse action ta-

ken including separation. Defendants' Exhibit F, p. 60, para. 102(e)(2).

27. The actions of Colonel Britt with the assistance of Captain David W. Hickman, the Staff Judge Aovocate, as reflected in the evidence, lead the Court to conclude that the revocation of Plaintiff's security clearance was not because of any adverse security significance but, rather, motivated solely by a deliberate intention to prevent Plaintiff from obtaining employment with civilian agencies who deal in the defense industry where security clearances are essential.

28. The Department of Air Force has failed to establish a rational nexus between the adverse action taken and the articulated reasons for the action.

29. Plaintiff's work opportunities have been severely limited by a fact determination which failed to comport with the traditional ideas of fair procedure;

and that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of, and the parties to, this action.

2. Plaintiff will be irreparably harmed if a preliminary injunction is not granted.

3. Plaintiff has made a prima facie case showing a reasonable probability that he will ultimately prevail on the merits.

4. The threatened injury to Plaintiff outweighs whatever damage the proposed preliminary injunction may cause Defendants.

5. The preliminary injunction, if issued, will not be adverse to the public

interest.

6. A preliminary injunction should be issued enjoining the Department of Air Force to reinstate Plaintiff's security clearance to the level held prior to May 24, 1985; and, further, that the Department of Air Force should be enjoined to remove the "Z code" by Plaintiff'a name in the AFSCO computer file and that the computer records should be programed to indicate that Plaintiff is entitled to access to classified material consistent with the security clearance held prior to May 24, 1985; that the Department of Air Force notify all inquiring agencies of the reinstatement of Plaintiff's security clearance without derogatory information.

[Signed by Juan G. Burciaga]
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
At Albuquerque
Sep 18 1986
Jesse Casaus
Clerk

THOMAS W. HILL,

Plaintiff,

v.

Civil No.
85-1485-JB

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Defendants.

PRELIMINARY INJUNCTION

THIS MATTER having come on for consideration of Plaintiff's motion for a preliminary injunction, and the Court having entered its findings of fact and conclusions of law, finds that the motion is well taken and should be granted.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Department of Air Force shall reinstate Plaintiff's security clearance to the level held prior to May 24, 1985;

2. Defendant Department of Air Force shall remove the "Z code" by Plaintiff's name in the AFSCO computer file;

3. Defendant Department of Air Force's computer records shall be programmed to indicate that Plaintiff is entitled to access the classified material consistent with the security clearance held prior to May 24, 1985; and

4. Defendant Department of Air Force shall notify all inquiring agencies of the reinstatement of Plaintiff's security clearance without derogatory information.

DATED this 18th day of September, 1986.

[Signed by Juan G. Burciaga]
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER. COLORADO 80294
October 27, 1986

ROBERT L. HOECKER
CLERK

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Ms. Barbara Herwig
Mr. Howard S. Scher
Appellate Staff, Civil Division
U.S. Department of Justice, Room 3631
Washington, D.C. 20530-0001

Re: No. 86-2418; Hill v. U.S. Department of the Air Force, et al.

Dear Counsel:

The court has today entered an order, in the captioned appeal, on the docket as follows:

"10/27/86 Order: Appellant's motion for stay pending appeal and emergency stay pending consideration of stay pending appeal is denied -- Circuit Judges

James K. Logan and Stephie K. Seymour.

(parties served by mail)"

Very truly yours,

[signed by]
ROBERT L. HOECKER, Clerk

RLH : kmh

cc: Mr. Thomas W. Hill, P.O. Box 14232, Albuquerque, NM 87191

Mr. William Lutz, U.S. Attorney, Mr. L. D. Harris, Assistant, P.O. Box 607, Albuquerque, NM 87103

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
MAY 28 1987
ROBERT L. HOECKER
Clerk

THOMAS W. HILL, Plaintiff-Appellee,	)	
v.	)	No. 86-2418 (D.C.No.85-1485JB) (D. N.M.)
DEPT. OF AIR FORCE, Defendant-Appellant,	)	
and	)	
PAUL. S. BRITT; PAUL J. VALLERIE, Defendants.	)	

ORDER AND JUDGMENT

Before ANDERSON and BARRETT, Circuit Judges, and THOMPSON, District Judge.*

* The Hon. Ralph G. Thompson, Chief Judge, U.S. District Court for the Western District of Oklahoma, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance

in the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court granting plaintiff's motion for a preliminary injunction and requiring the defendant Air Force to reinstate plaintiff's security clearance, remove the "Z code" from plaintiff's name in its computer files, program the computer files to indicate plaintiff is entitled to access to classified materials consistent with his previous security clearance, and notify all inquiring agencies of the reinstatement of plaintiff's security clearance without giving any derogatory information.

The district court stated that it had jurisdiction to consider this case. Although the parties do not address jurisdiction on appeal, the jurisdiction of

the district court is not clear. This court may sua sponte raise issues relating to jurisdiction. McKinney v. Gannett Co., 694 F. 2d 1240, 1245-46 (10th Cir. 1982); United States v. Siviglia, 686 F. 2d 832, 835 (10th Cir. 1981), cert. denied, 461 U.S. 918 (1983); Golden Villa Spa, Inc. v. Health Indus., Inc., 549 F.2d 1363, 1364 (10th Cir. 1977).

Because the basis for the district court's jurisdiction is unclear, we partially REMAND this matter for the limited purpose of allowing the district court to explain the basis for its jurisdiction. Upon conclusion of the district court proceedings, the clerk of the district court shall transmit the record of the proceedings to this court as a supplemental record on appeal.

This court shall retain jurisdiction of this appeal for all other matters.

ENTERED FOR THE COURT PER CURIAM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
AUG 21 1987
Jesse Casaus, Clerk

THOMAS W. HILL,

Plaintiff,

v. Civil No. 85-1485-JB

DEPARTMENT OF AIR FORCE,
MERIT SYSTEMS PROTECTION BOARD,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for a hearing on August 7, 1987, following the partial remand of the matter by the United States Court of Appeals for the Tenth Circuit "for the limited purpose of allowing the district court to explain the basis for its jurisdiction" following the Court's entry of a preliminary injunction requiring the Defendant Air Force to reinstate

Plaintiff's security clearance access to classified materials.

At the hearing the Court elected to state to the parties its bases for concluding that there was jurisdiction to enter the preliminary injunction. The Court then afforded the parties an opportunity to state their opposition to the Court's conclusions. The Court not having been persuaded by the Government's arguments to the contrary, finds that it has jurisdiction over the subject matter of the preliminary injunction entered in this cause on September 18, 1986, and herein adopts its findings and conclusions as stated in open court on August 7, 1987, with the following elaborations.

The Court relies on the matters alleged in the Fourth Cause Of Action contained in Plaintiff's Second Amended Complaint to support its entry of the preliminary injunction. As Plaintiff has ap-

peared pro se at all times in this action, the Court has given Plaintiff's complaint a liberal reading. The Court adopts the findings of fact and conclusions of law entered in connection with its grant of a preliminary injunction on September 18, 1986. The Court is of the opinion, as it was on that date, that the facts adduced at that hearing support Plaintiff's allegations that the agency actions in suspending his access to classified material were illegal and resulted in deprivation of his fifth amendment rights to due process and equal protection of the laws.[1]

---

1 As the facts demonstrate, the continuing investigation of Plaintiff's suspension to access resulted in the creation of a special security file. When Plaintiff was removed from this position with the Air Force, the investigation by the Air Force was terminated and Plaintiff's status as a security risk remained unadjudicated. The Court previously found that the action was "adverse" to Plaintiff, and under the Air Force's own regulations, required a final adjudication. The Defendant maintains that this was not

Such claims involve a federal question that supports jurisdiction under 28 U.S.C. § 1331. While the Air Force has not waived its sovereign immunity with respect to damage actions where a constitutional violation is implicated, 5 U.S.C. § 702 allows for the grant of injunctive relief against the United States or its agencies. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Surely there is no more serious wrong than a constitutional wrong and that is the "legal wrong" implicated in this

---

an adverse action, and that no adjudication was required as Plaintiff was no longer an employee of the Air Force. However, the special security file resurfaced, restricting him from regaining a security clearance as a civilian employee. The Air Force's irrational procedures place Plaintiff in a "Catch-22" situation.

cause. While the Court acknowledges that § 702 is not an independent grant of federal jurisdiction, the underlying constitutional cause of action supports the Court's jurisdiction to award injunctive relief.

While Defendants contend that Plaintiff is limited to statutory remedies and procedures only, the Court disagrees and finds the authority relied on by Defendants to be distinguishable. While it is true that much deference is afforded to agency action in grievances between the Government and its employees, this is not the case when constitutional rights are implicated and injunctive relief is sought. Andrade v. Lauer, 729 F.2d 1475, 1491 (D. C. Cir 1984). It is true that where damages are sought as the result of an allegedly unconstitutional "federal personnel policy," there may be "special factors counseling hesitation" in expand-

ing the employee's common law remedies where the Civil Service Reform Act provides a comprehensive remedial scheme. See Bush v. Lucas, 462 U.S. 367 (1983). There are different fiscal and policy concerns when injunctive relief is sought to remedy an ongoing constitutional violation. Accord Doe v. United States Department of Justice, 753 F. 2d 1092, 1109 n. 17 (D.C. Cir. 1985) ("nothing in Bush or any other Court opinion casts doubt on the presumed availability of federal equitable relief against federal officials for committing constitutional violations" (emphasis added)). Furthermore, it is the Court's understanding that the Merit Systems Protection Board, who entertained Plaintiff's appeal of the removal decision, declined to review the security clearance issues. Where there is no other remedy that Plaintiff could invoke, the Bush v. Lucas rationale does not ap-

ply and the constitutional issues are ripe for determination hy this Court. See Bush, 462 U.S. at 391 (Marshall, J., concurring); McIntosh v. Weinberger, 810 F. 2d 1411, 1435 (8th Cir. 1987); National Treasury Employees Union v. Reagan, 651 F.Supp. 1199 (E.D. La. 1987).

The Court finds that Plaintiff has alleged cognizable liberty and property interests under the due process clause that are independently deserving of protection. Plaintiff had a legitimate expectation of entitlement to access to classified information unless and until his access was terminated with proper procedures based on the reasonable finding that he was a security risk. The Court further finds that Plaintiff has presented a colorable claim that the suspension of his access to classified materials infringed on a liberty interest. The government's placing of Plaintiff's security

file in an unadjudicated or incomplete status and disseminating such information impugn the Plaintiff's standing and reputation and limits his ability to secure employment. The Court's preliminary findings also support that Plaintiff was treated in a purposefully discriminatory and arbitrary fashion, with a stated intent to "get" tbe Plaintiff. Such conduct would not be rationally related to legitimate government purposes and implicates a violation of equal protection. The Court finds support for the principle that jurisdiction lies where agency action has been challenged as unconstitutional and equitable relief is sought against government agencies. See Ogden v. United States, 758 F. 2d 1168, 1177 n. 5 (7th Cir. 1985); Ghandi v. Police Department of City of Detroit, 747 F. 2d 338, 343 (6th Cir. 1984); Swift v. United States, 649 F.Supp. 596 (D.C. 1986). The

cases cited by Defendants, Weatherford v. Dole, 763 F. 2d 392 (10th Cir. 1985) and Broadway v. Block, 694 F.2d 979 (5th Cir. 1982), are not inapposite where a colorable constitutional claim is implicated.

Having conducted a hearing on the matter and the Court having stated its additional findings and conclusions, and having entered this memorandum opinion, the Court orders that this matter be returned to the Court of Appeals for the Tenth Circuit, in compliance with that court's Order and Judgment of May 28, 1987. This Court shall retain jurisdiction over all matters not related to the appeal.

DATED this 21st day of August. 1987.

[Signed by Juan G. Burciaga]
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
MAR 30 1988
ROBERT L. HOECKER
Clerk

THOMAS W. HILL, Plaintiff-Appellee, v. DEPT. OF AIR FORCE, Defendant-Appellant, and PAUL. S. BRITT; PAUL J. VALLERIE, Defendants.	No. 86-2418 (D.C.No.85-1485JB) (D. New Mexico)

ORDER AND JUDGMENT

Before ANDERSON, BARRETT, Circuit Judges, and THOMPSON,* District Judge.

*Hon. Ralph G. Thompson, Chief Judge, U.S. District Court for the Western District of Oklahoma, sitting by designation.

After examining the briefs and appellate record, this panel has determined

unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court granting Thomas W. Hill's motion for a preliminary injunction and requiring the defendant Department of the Air Force to reinstate Hill's security clearance, remove the "Z code" relating to Hill's security clearance in its computer files, program the computer files to indicate Hill is entitled to access to classified materials consistent with his previous security clearance, and notify all inquiring agencies of the reinstatement of Hill's security clearance without giving any derogatory information.

On appeal the Air Force argues that the district court erred in ordering the

Air Force to restore Hill's security clearance and in prohibiting the Air Force from releasing information pertaining to Hill's suitability for a security clearance. Specifically, the Air Force maintains that (1) courts are not permitted to second-guess the merits or wisdom of military or national security decisions; (2) the only proper basis for review of a military or national security decision is to determine whether pertinent procedural regulations were followed; (3) at most, the action should have been remanded to the Air Force for redetermination; and (4) there is no occasion to order reinstatement of a security clearance when an employee's removal from employment has not been set aside. We agree with the Air Force on every point.

At the request of this court the district court has filed a supplemental opinion explaining the basis for its jur-

isdiction, and reaffirming its earlier determination that it has jurisdiction in the matter.

The district court has reasoned that jurisdiction was conferred upon it under 28 U.S.C. § 1331 on the theory that "agency actions in suspending [Hill's] access to classified material were illegal and resulted in deprivation of [Hill's] fifth amendment rights to due process and equal protection of the laws." The court found that Hill had both constitutional liberty and property interests in his security clearance, and "had a legitimate expectation of entitlement to access to classified information unless and until his access was terminated with proper procedures based upon the reasonable finding that he was a security risk." The court further found that Hill's liberty interests were infringed when his clearance was suspended because dissemination of

Hill's suspended status impugned Hill's standing and reputation, and limited Hill's ability to secure employment. Finally, the district court ruled that Hill's superior maliciously caused the suspension of Hill's clearance out of personal animosity, and "[s]uch conduct would not be rationally related to legitimate government purposes and implicates a violation of equal protection."

On February 23, 1988, the United States Supreme Court issued its opinion in Dep't. of the Navy v. Egan, 108 S. Ct. 818 (1988). That opinion (which we awaited for whatever guidance it might afford in our disposition of this case) directly addresses only the narrow question of whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an ad-

verse action." Id. at 820 (emphasis added). Nevertheless, the case removes any doubt regarding the authority of federal courts to review the merits of the grant or denial of security clearances. Under any circumstance which might be germane to this case, there is no such authority. As is indicated by the Supreme Court's statement of the question in that case, Egan extends to the merits of suspension, modification or revocation of a previously granted security clearance, since the underlying rationale applies with equal logic to revocation as it does to an initial grant of authority. These matters are a "sensitive and inherently discretionary judgment call... Committed by law to the appropriate agency of the Executive Branch." Id. at 824. The court elaborated as follows:

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U. S.

Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. See Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961). This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. Snepp v. United States, 444 U.S. 507, 509, n.3 (1980). See also United States v. Robel, 389 U.S. 258, 267 (1967); United States v. Reynolds, 345 U.S. 1, 10 (1953); Totten v. United States, 92 U.S. 105, 106 (1875). The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

* * *

It should be obvious that no one has a "right" to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance maybe granted only when "clearly consistent with the interests of the national security." See, e.g., Exec. Order No. 10450, §§ 2 and 7, 3 CFR 936, 938 (1949-

1953 Comp.); 10 CFR § 710.10 (a) (1987) (Department of Energy); 32 CFR § 156.3(a) (1986)(Department of Defense). A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic." Molerio v. FBI, 242 U.S. App. D.C. 137, 146, 749 F.2d 815, 824 (1984). The attempt to define not only the individuals [sic] future actions, but those of outside and unknown influences renders the "grant or denial of security clearances... an inexact science at best." Adams v. Laird, 136 U.S. App. D.C. 388, 397, 420 F.2d 230, 239 (1969), cert. denied, 397 U.S. 1039 (1970).

Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons... too obvious to call for enlarged discussion," CIA v. Sims, 471 U.S. 159, 170 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible,

and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. Cole v. Young, 351 U.S. 536, 546 (1956). As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." Haig v. Agee, 453 U.S. 280, 293-294 (1981). "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." United States v. Nixon, 418 U.S. 683, 710 (1974). Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. See e.g., Orloff v. Willoughby, 345

> U.S. 83, 93-94 (1955), Burns v. Wilson, 346 U.S. 137, 142, 144 (1953), Gilligan v. Morgan, 413 U.S. 1, 10 (1973), Schlesigner v. Councilman, 420 U.S. 738, 757-758 (1975), Chappel v. Wallace, 462 U.S. 296 (1983).

Id. at 824-26 (emphasis added).

There are strong parallels between this case and Egan. Both Hill and Egan lost their civilian jobs with agencies of the military under circumstances related to a security clearance. Egan lost his job because he was not granted a clearance. Hill lost his job because of the same misconduct (conversion of telephone services, among other actions) which was cited as the reason for the suspension of his clearance. And, although Hill's employment was not immediately affected by his loss of access to secret information, we assume it would have been affected by ultimate revocation of his clearance.

Both Hill and Egan contested their loss of employment, and received full due

process under applicable statutes and regulations: notice, hearing before the Merit Systems Protection Board ("MSPB"), confrontation, and rights of appeal. In that process Hill was able to present affirmative defenses, and defenses on the merits, without success. Egan's loss of employment due to his inability to get a clearance was eventually upheld on appeal. Hill's loss of employment was also upheld on appeal.[1] The fact that Hill lost his job because of misconduct presents a much stronger case for the terminating agency than the fact situation in Egan.

In Egan the MSPB was held to have no authority to review "the substance of an underlying decision to deny or revoke a security clearance." Id. at 820 (emphasis added). Here, the MSPB refused to hear Hill's arguments with respect to Air Force action as to his security clearance because it was his misconduct, not the

suspension of his clearance that cost him his job. But that does not alter the controlling proposition. Under Egan, if Hill's clearance had been revoked, and his job lost as a result, neither the MSPB nor the courts would have had statutory authority to conduct the very type of review Hill urges here, and which the district court accorded him -- a review which examined the merits and motives of Air Force decisions relating to Hill's clearance, and the nexus between those decisions and national security interests. If the merits underlying a revocation can not be examined, there are even stronger reasons why the merits underlying an interim action such as a suspension cannot be examined. We have no doubt that if Hill's arguments on the suspension of his

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1 Hill v. Dep't. of the Air Force, No. 86-1081 (Fed. Cir. Feb. 10, 1987), reh'g denied, March 9, 1987.

security clearance had been before the MSPB in the context of hearings on his job loss, or otherwise, the MSPB would would have been prohibited under Egan from doing what the district court did here. The MSPB, and reviewing courts, would have been limited to the fact of suspension and whether suspension had occurred for a facially valid reason. The substance of the underlying decision would be beyond review.

Of course the holding in Egan deals with statutory powers of review. The essential question before us is whether the constitutional allegations advanced below form an independent jurisdictional basis by which the district court could proceed to examine and pass on the merits of the Air Force decision to suspend Hill's security clearance. Prior to examining that question, we observe at the outset that if the statutory constraints imposed in

Egan can be bypassed simply by invoking alleged constitutional rights, it makes the authority of Egan hardly worth the effort.

The constitutional rights invoked in this case are those of due process and equal protection. As the district court correctly perceived, Fifth Amendment due process is not implicated here unless Hill had a constitutionally cognizable property or liberty interest in his security clearance under the circumstances of this case. See Weatherford v. Dole, 763 F.2d 392, 393 (10th Cir. 1985); Broadway v. Block, 694 F.2d 979 (5th Cir. 1982).

We hold that Hill did not have a constitutional property or liberty interest in his security clearance. The same reasoning which underpins Egan supports that conclusion. The Executive Branch has constitutional responsibility to classify and control access to information bearing

on national security. A security clearance is merely temporary permission by the Executive for access to national secrets. It flows from a discretionary exercise of judgment by the Executive as to the suitability of the recipient for such access, consistent with the interests of national security. The notion of an individual property right in access to the nation's secrets -- by definition a limitation on Executive discretion -- is utterly inconsistent with those principles. Whatever expectation an individual might have in a clearance is unilateral at best, and thus cannot be the basis for a constitutional right. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Hill emphasizes the existence of procedural rules which have been developed by the Department of Defense and the various military agencies relating to the suspension and potential revocation of an

existing clearance. Dept. of Defense Regulation 5200.2R/Air Force Regulation (AFR) 205-32 (Nov. 26, 1982). Those procedures are not the type of "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-541 (1985); Paul v. Davis, 424 U.S. 693, 709 (1976). The procedures are administrative devices which are indeed intended to promote fairness and safeguard the rights of individual employees, but are not intended thereby to diminish Executive authority rooted in Executive responsibility. If the courts attempt to attach constitutional rights to security clearances because rules have been promulgated to better administer employee relations, it will provide a disincentive for government agencies "to continue improv-

ing the mechanisms by which an aggrieved employee can protect his rights." Bush v. Lucas, 647 F.2d 573, 577 (5th Cir. Unit B [sic] June 1981) aff'd, 462 U.S. 367, 103 S.Ct. 2404, 76 L. Ed. 2d 648 (1983). See also Broadway v. Block, 694 F.2d 979 (5th Cir. 1982).

The foregoing discussion applies as well to the question of a liberty interest where Hill is concerned, with an additional explanation. The district court found that suspending Hill's clearance, creating a file showing the suspension, and disseminating such information, impugned Hill's standing and reputation and limited his ability to secure employment. Egan compels a different view: "A clearance does not equate with passing judgment upon an individual's character." Egan at 9-10. The same is true of a suspension. Furthermore, potential dissemination of the underlying reasons for the

suspension, thus possibly damaging Hill's employability, was overshadowed in any event by the fact of and reasons for Hill's discharge. Full due process and a name-clearing opportunity were provided Hill in that regard. The reasons for both suspension and discharge were the same as was, presumably, their impact, if any, on Hill's ability to secure employment based on his character and reputation. The Air Force could not, and should not, be prohibited from communicating to prospective employers who do work for the government the facts underlying Hill's discharge. Finally, the suspension itself neither deprived Hill of his employment, since he remained employed until removed for misconduct, nor "foreclosed" other employment opportunities. See Board of Regents v. Roth, 408 U.S. 504, 573-74 (1971). Upon seeking employment in the private sector which requires a security clearance

Hill is free to apply to the Defense Industrial Security Clearance Office for a clearance, and to receive a full hearing if denial of a clearance is proposed. In short, there was nothing in the suspension itself which implicated a liberty interest.

Constitutional questions aside, however, courts do have the power to compel agencies to follow their own regulations. See e.g., Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 892-93 (1960); Watkins v. United States Army, 721 F. 2d 687, 690 (9th Cir. 1983). The Air Force acknowledges that point. Supplemental Brief for the Appellants on Jurisdiction at 5 ("[W]e do not dispute that the district court had jurisdiction to review whether the required procedures were followed....")

But the district court made no finding that the Air Force violated any parti-

cular procedure; and even if such a finding had been made the remedy would have been a remand for the purpose of compliance with applicable procedures, not an order requiring reinstatement of Hill's clearance. See generally Gayer v. Schlesinger, 490 F.2d 740, 752 (D.C.Cir. 1973).

Hill's main complaint is that the Air Force refused to continue the process of adjudicating his security status after his employment was terminated. That refusal has left the suspension of his clearance, with a "Z" code, intact and in limbo. He contends he is still entitled to a hearing with respect to the reasons asserted for the suspension of his clearance and whether he can fairly be labeled a security risk after almost twenty years of loyal service. The Air Force responds that it has neither need nor authority to apply an employee-related adjudication process to someone who is no longer an em-

ployee. Hill calls that response a "catch-22".

As a general proposition, the Air Force makes a valid point. The security clearance was issued by the Air Force solely to facilitate on-the-job performance by one of its employees, not to create an independent, portable right for the benefit of a former employee. However, it is unnecessary for us to decide whether the Air Force can be ordered to complete its adjudication of a former employee's clearance because we view Hill's removal for misconduct as a material intervening, and dispositive, factor. There is no way to return Hill to the status quo ante. Hill's fully adjudicated discharge resulted in a finding by the MSPB of misconduct and that Hill's "misconduct related to his integrity and trustworthiness." MSPB Mem. Op. Nov. 6, 1985 at 24. The findings of the MSPB were upheld on

appeal and are conclusive and binding on us, Hill, and the Air Force. Those facts on their face would make a remand regarding a top secret clearance a useless exercise. At the very least the factual basis upon which adjudication would proceed would be so substantially altered as to present an entirely different case. For instance, Hill would not be entitled to re-litigate the issue of his conversion of telephone services.

Furthermore, it is a fallacy to contend that no hearing is available. Hill is entitled to apply anew for a clearance from the appropriate agency as an employee of a government contractor. When investigation of that application turns up the special file created by the Air Force, Hill can make his explanations and avail himself of the detailed procedures for notice and a hearing permitted with respect to any proposed adverse action.

Dept. of Defense Directive, 5220.6, August 12, 1985, (codified at 32 C.F.R. § 155 (1987)). Under those procedures Hill would receive the very same type of hearing, and with respect to the same matters and contentions, that he complains he was not accorded by the Air Force. We understand that since his termination by the Air Force Hill has obtained other employment and has been granted a top secret security clearance. If that clearance is affected by the dissolution of the preliminary injunction issued in this case, then Hill still would be entitled to notice and a hearing of the same type and quality just mentioned.

Since the district court supported its finding of jurisdiction under the Equal Protection Clause and the Administrative Procedure Act, 5 U.S.C. §702, on the same reasoning which we have already addressed and rejected in the foregoing dis-

cussion, it is unnecessary to pursue those subjects. We hold that no jurisdiction was conferred on those grounds.

To summarize, the district court improperly based its jurisdiction upon constitutional grounds and, in that connection, evaluated the motives and the merits of the agency's actions with respect to Hill's security clearance. The Supreme Court has now made clear, in Egan, that the courts are without power to conduct such a review under circumstances which would include those presented in this case. The district court lacked jurisdiction on the grounds ennumerated in its decision. The court did have jurisdiction in general with respect to whether procedures were violated, but had no authority to order a reinstatement of Hill's clearance, or to grant the additional relief contained in the preliminary injunction. Furthermore, we hold that, under

the circumstances of this case, a further review of the procedures followed in suspending Hill's clearance, and of the agency's refusal to continue to adjudicate the matter following Hill's removal for misconduct, is unnecessary and inappropriate. The case is remanded to the district court with instructions to dissolve the preliminary injunction issued in this case. Upon proper motion by the Air Force the district court shall dismiss with prejudice the fourth cause of action contained in Hill's second amended complaint, dealing with his security clearance and alleged actions or omissions by the Department of the Air Force with respect thereto.

Entered for the Court:

Stephen H. Anderson
Circuit Judge

MAY TERM - May 11, 1988

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell Reece Tacha, Honorable Bobby R. Baldock, and Honorable Wade Brorby, Circuit Judges, United States Court of Appeals, and Honorable Ralph G. Thompson, Chief Judge, United States District Court for the Western District of Oklahoma*

THOMAS W. HILL,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 86-2418
	)	
DEPT. OF AIR FORCE,	)	
	)	
Defendant-Appellant,	)	
	)	
and	)	
	)	
PAUL S. BRITT;	)	
PAUL J. VALLERIE,	)	
Defendants.	)	

This matter is before the court on appellee's petition for rehearing with

* The Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma, sitting by designation.

suggestion for rehearing en banc, motion to stay the mandate, motion for oral argument if rehearing is granted, and objection to the taxation of costs.

It is ordered:

1. The materials submitted by appellee have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition for rehearing is denied on the merits. The petition having been denied on the merits by the panel to whom the case was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled, the suggestion for rehearing en banc is denied.

2. The motion for oral argument if rehearing is granted is denied as moot.

3. The motion to stay the mandate for thirty days is granted. See Fed. R.

App. P. 41 (b).

4. The objection to taxation of costs is denied.

ROBERT L. HOECKER, Clerk
[signed by Patrick Fisher,
Chief Deputy Clerk]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

THOMAS W. HILL,	)	FILED JAN 27 1986 Jesse Casaus, Clerk
Plaintiff,	)	
v.	)	Civil No. 85-1485 JB
DEPT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

Comes now the plaintiff, Thomas W. Hill, appearing pro se, and for cause of action herein, alleges and states:

Jurisdiction and Venue

This is a civil action for injunctive, declaratory, and monetary relief, and mandamus action. The Court has jurisdiction over all involved issues pursuant to provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552;

the Privacy Act of 1974, 5 U.S.C. § 552a; the Administrative Procedure Act, 5 U.S.C. §§ 551 and 701 et seq.; the Civil Service Reform Act of 1978, 5 U.S.C.§ 2301 et seq. and 5 U.S.C. §§ 7702 and 7703; the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 631 and 633a; 28 U.S.C. §§ 1331 and 1361; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States. Venue is proper this district pursuant to provisions of 5 U.S.C. § 552a (g)(5); 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 703; 28 U.S.C. § 1391 and other statutes.

...

Facts Relevant To Causes Of Action

...

8. ... At the time of notification Britt stated that he was withdrawing plaintiff's access to classified information and read aloud some notes he had prepared. Reference Exhibit "5" ...

...

11. On 30 June 1985 plaintiff submitted a letter to the AFCMD Commander complaining that he had been denied due process by the actions taken by agency officials in suspending his security clearance. Reference Exhibit "6" ...

...

Fourth Cause Of Action

1. The actions taken by the agency in suspending plaintiff's access to classified information have not conformed with the provisions of the agency's governing regulations, i.e., Air Force Regulation 205-32 and other regulations, and have thus resulted in denial of due process.

2. Agency actions taken subsequent to the illegal suspension of such access have not conformed with the provisions of 5 U.S.C. § 7532, and have resulted in further denial of due process.

3. The agency has illegally placed plaintiff's security clearance indefinitely in an "in adjudication" status at the Air Force Security Clearance Office ("AF SCO") in Washington, D.C., and will not accomplish "further processing ... until [he] ... is reinstated as a government employee". Reference Affidavit of J. Leon Vialpando attached herewith as Ex. "18".

4. Said abeyance of further action has resulted in an unwarranted slur on plaintiff's reputation and also prevents his obtaining other employment commensurate with his capabilities.

5. Agency officials have used actions related to the improper suspension in an attempt to coerce plaintiff to voluntarily resign from his former position, thereby abandoning his right of judicial review of the illegal removal.

6. Plaintiff has exhausted all potential for administrative relief, and is

entitled to judicial review and mandamus action against the agency to restore his clearance, in accordance with the provisions of 5 U.S.C. §§ 702 and 2302, and 28 U.S.C. § 1361.

...

Relief Sought

Wherefore, Plaintiff prays that the Court will

(i) Issue a declaratory judgment that plaintiff has been denied due process by the defendants, and has been the victim of actions specifically prohibited by law, ...

(iv) Order the agency to remove the "in adjudication" notation entered on plaintiff's security clearance records as maintained by the Air Force Security Clearance Office, and further to reinstate plaintiff's security clearance, because of denial of due process and also because of the agency's failure to estab-

lish any nexus between alleged actions and plaintiff's ability to safeguard classified information, ...

(viii) Permanently enjoin Paul S. Britt or anyone acting under his supervision or on his behalf, from taking any action of any type which would have adverse impact on plaintiff's employment, and Order other sanctions against agency officials as deemed to be appropriate by the Court, ... and

(xii) Grant such other and further relief to plaintiff as the Court deems to be just and proper.

Plaintiff respectfully demands trial by jury of all issues of fact, and de novo consideration by the Court of all matters involved in this action.

[signed]
Thomas W. Hill, Pro Se

SP/ F.Farris/ 4-0171/ dd/ 24 Jul 85

Rewritten 25 Jul 85

[From:] CC

[Subj:] Special Security File (SSF) re Mr Thomas W. Hill, 239-56-9010 DAFC

[To:] HQ AFSCO (Col Evans)

1. A Special Security File (SSF) on AFCMD employee, Mr Thomas W. Hill, has been forwarded to you by the 1606 ABW/SPIA, the servicing security police office for Kirtland AFB. Mr Hill's security clearance eligibility is presently in adjudication.

2. At Mr Hill 's personal request I have looked into this matter. As the new AFCMD Commander (as of 2 Jul 85) it was incumbent upon me to carefully scrutinize all aspects of this case to make the decision. My review of the case reveals the following:

a. The acts attributed to Mr Hill, although they may have shown a lapse in

judgment and are of a serious nature, did not have adverse security significance.

b. I do not believe the facts of this case indicate that Mr Hill has been a threat to national security or that he may be subject to coercion, influence or pressure that could cause him to act contrary to the national security.

c. His security record during the past 20 years has not been blemished and withdrawal of his security clearance is unwarranted.

3. Request that this matter be given your very careful review and I recommend removal of "in adjudication" status and that Mr Hill's clearance be reinstated.

4. Request that you expedite the adjudication of the Special Security File (SSF).

BERNARD L. WEISS
Major General, USAF
Commander

cc: 1606 SPG

DECLARATION OF SERVICE

Pursuant to the provisions of 28 U.S.C. § 1746, I hereby declare service of the foregoing petition with appendix on the opposing parties by first-class mailing of true copies to:

Howard S. Scher, Appellate Staff
Civil Division, Room 3631
Department of Justice
Washington, D.C. 20530

on the 10th day of June, 1988, Manhattan Beach, California.

/Thomas W Hill/

Thomas W. Hill, Pro Se
463 36th Place
Manhattan Beach, CA 90266

(2)

No. 87-2029

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS W. HILL, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE,
PAUL S. BRITT, AND PAUL J. VALLERIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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No. 87-2029

THOMAS W. HILL, PETITIONER

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DEPARTMENT OF THE AIR FORCE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in dissolving an injunction requiring the Air Force to reinstate his top secret security clearance and to notify any inquiring employer that he is entitled to access to classified materials.

1. Petitioner was a civilian employee of the Air Force from January 1966 to July 1985. Immediately prior to his termination, he had been assigned to Kirtland Air Force Base, New Mexico, where he worked in the Directorate of Aerospace Studies in space weaponry research (sometimes called "star wars" research). Pet. App. 2. In May 1985, the Air Force served him with a notice of proposed removal from the federal service based on his alleged misuse of government long distance telephone service and his unauthorized removal of records from the desk of a prior supervisor (*id.* at 3, 40). For the same reasons, the Air Force determined that petitioner was untrustworthy and

suspended his top secret security clearance (*id.* at 7, 40).[1] Petitioner was removed from his job in July 1985 (*id.* at 2).

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). He did not dispute that he had misused government telephone service or improperly removed records from his supervisor's desk, but instead argued that dismissal was not warranted for those offenses. The MSPB "fully adjudicated" his discharge claim, concluding that petitioner's " 'misconduct related to his integrity and trustworthiness' " (Pet. App. 51 (quoting MSPB Mem. Op. at 24)). The MSPB's decision upholding the removal was in turn affirmed by the Federal Circuit (*Hill* v. *Dep't of the Air Force*, No. 86-1018 (Feb. 10, 1987)).

After he was removed, petitioner sought employment in the private sector that required him to have access to classified information. He brought this suit in the United States District Court for the District of New Mexico challenging the suspension of his security clearance, and the court entered a preliminary injunction requiring the Air Force to restore the clearance. The court also ordered the Air Force to remove the "Z Code" modifier, a notation indicating that it might possess information pertinent to petitioner's suitability for a security clearance, from his records, and prohibited the Air Force from providing "derogatory information" about petitioner to employers. Pet. App. 16.

The court of appeals sua sponte remanded the case "for the limited purpose of allowing the district court to explain

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[1] The classification ' Top Secret" applies "only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." Exec. Order No. 12,365, § 1.1(a)(1), 3 C.F.R. 166, 167 (1983 Comp.); see also DOD Directive 5200.1-R, § 1-501 (1979).

the basis for its jurisdiction" (Pet. App. 21). The district court thereafter issued an opinion (*id.* at 21-30) finding that it had jurisdiction under 28 U.S.C. 1331, the federal question provision, because petitioner had alleged that the suspension of his security clearance "resulted in deprivation of his fifth amendment rights to due process and equal protection of the laws" (Pet. App. 24-25) (footnote omitted)). The district court went on to conclude, with respect to petitioner's due process claim, that he had a property interest in his security clearance and a colorable claim that the suspension of his clearance infringed on a liberty interest (*id.* at 28). The court also concluded that its preliminary findings indicated that the Air Force may have treated petitioner arbitrarily, "implicat[ing] a violation of equal protection" (*id.* at 29).

After this Court issued its decision in *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), holding that the MSPB may not review a decision to deny or revoke a security clearance, the court of appeals remanded with instructions that the district court dissolve the preliminary injunction (Pet. App. 31-55).

2. As the court of appeals concluded, *Egan* disposes of petitioner's claims. The Court in *Egan* determined that the "predictive judgment" as to who should have security clearances "must be made by those with the necessary expertise in protecting classified information" and that "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment" (slip op. 10). Accordingly, under *Egan*, as the court of appeals concluded, the district court erred in reviewing "the merits and motives of Air Force decisions relating to [petitioner's] clearance" (Pet. App. A42). While petitioner's claim differs from the claim in *Egan* in that he alleges constitutional violations, the court of appeals correctly noted that

if the holding in *Egan* "can be bypassed simply by invoking alleged constitutional rights, it makes the authority of *Egan* hardly worth the effort" (Pet. App. 44).[2]

In addition, since the Court stressed in *Egan* that "no one has a 'right' to a security clearance" (slip op. 9), the court of appeals correctly concluded that there was no basis for petitioner's claim that he had a property interest in his security clearance (Pet. App. 45). And since a "clearance does not equate with passing judgment upon an individual's character" (*Egan*, slip op. 9-10), the court of appeals correctly concluded that the Air Force had not infringed on any liberty interest by suspending petitioner's security clearance. In any event, as the court noted, the remedy for infringement of a liberty interest is a name-clearing hearing, and petitioner had already had an opportunity to clear his name in the MSPB proceeding in which he challenged his removal. The allegations that petitioner had misused government telephone service and removed records from a supervisor's desk served as the bases for both his removal and the suspension of his security clearance, and petitioner could have challenged those allegations in the MSPB proceeding, but did not. Furthermore, as the court noted (Pet. App. 48-49), petitioner, who has obtained a top secret security clearance and a job with a defense contractor, will have another opportunity

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[2] The decision below is not inconsistent with the decision in *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), where the Court held that a constitutional challenge to the dismissal of an agent of the Central Intelligence Agency was reviewable. In that case, the petitioner sought judicial review of his dismissal, not a decision to revoke his security clearance. Moreover, in that case no other avenue for obtaining judicial review was available, whereas the petitioner here was able to challenge his dismissal in the MSPB and the Federal Circuit. Petitioner's challenge to the suspension of his security clearance is therefore governed by *Egan*, not by *Webster* v. *Doe*.

to clear his name if he loses his clearance after the injunction is dissolved, since he may challenge the revocation of a clearance under 32 C.F.R. 155.[3]

The court of appeals also correctly concluded that whether a procedural violation was committed in the course of the suspension of petitioner's security clearance by the Air Force is a matter of no continuing importance. The MSPB concluded that petitioner was properly removed from the Air Force on the basis that he was untrustworthy, and its decision was upheld on appeal and is "conclusive and binding" (Pet. App. 51-52). Given that it is too late to restore petitioner to his position with the Air Force, the question whether the Air Force followed proper procedures in revoking the security clearance he held in connection with that position has no retrospective significance. As the court noted (*id.* at 53), if the security clearance petitioner currently holds is revoked after the injunction is dissolved, he may challenge that decision under 32 C.F.R. 155.[4]

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[3] Section 155 provides that a "security clearance shall not be revoked unless the applicant has been provided with a written Statement of Reasons" (32 C.F.R. 155.7(c)). The applicant may respond and obtain a hearing at which he (or his counsel) may present evidence and cross-examine adverse witnesses (32 C.F.R. 155.7(g)). The hearing examiner must make written findings "for or against the applicant with respect to each allegation in the Statement of Reasons" (32 C.F.R. 155.7(q)). The examiner's decision is subject to review by an Appeal Board, an expert panel within the Department of Defense (32 C.F.R. 155.3), and the Board must also issue a written opinion (32 C.F.R. 155.7(u)).

[4] The other arguments advanced by the pro se petitioner, such as his contention (Pet. 33-41) that the Privacy Act, 5 U.S.C. (& Supp. IV) 552a, requires the Air Force to reinstate his security clearance and his contention (*id.* at 41-44) that his supervisor caused his security clearance to be suspended because he disliked petitioner, which were not addressed by the court of appeals, plainly do not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1988

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(3)

PETITION NO. 87 - 2029

SUPREME COURT OF THE UNITED STATES

OCTOBER 1987 TERM OF COURT

THOMAS W. HILL,

Petitioner-Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE,
MERIT SYSTEMS PROTECTION BOARD,
PAUL S. BRITT, and
PAUL J. VALLERIE,

Respondents-Defendants.

ON WRIT OF CERTIORARI TO THE U.S. COURT

OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF, SEEKING SUMMARY DISPOSAL ON THE BASIS OF THE SUPREME COURT DECISION IN WEBSTER V. DOE

THOMAS W. HILL,
Petitioner, Pro Se
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Manhattan Beach
California 90266

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PETITIONER'S REPLY TO OPPOSITION

1. In its opposition, Respondent has misstated the facts. At the minimum, Petitioner is entitled to acceptance of the facts as found by the District Court.

a. Respondent claims that Petitioner never disputed that he "improperly removed records from his supervisor's desk", and further claims that the issue was "fully adjudicated" before the MSPB. Both claims are blatantly false.

(1) In support of the MSPB appeal and timely-filed agency grievances Petitioner produced affidavits executed by Paul J. Vallerie, affirming that the records were his "personal notes" deliberately left at the Directorate. The agency refused to proceed with the grievance and the MSPB refused to consider the matter, ordering (MSPB Case DE07528510204 TAB 35),

> "The presiding official will not consider ... the merits of [Petitioner's] past dis-

> ciplinary record ... or the merits of his protected activities -- whistleblowing, grievances, FOIA and Privacy Act actions."

(2) The only review of the matter was provided by the District Court, which found (Pet. App. p. 3),

> "... Britt ... accused Plaintiff of theft for Plaintiff's removal of personal notes abandoned by a previous Directorate employee." [Emphasis added.]

(3) The theft charge was never before the MSPB, even though Petitioner demanded review. See MSPB Decision, supra, at TAB 57, pp. 6-7,

> " ... [A]ppellant is not charged with theft; instead appellant is charged with conversion. Therefore, the agency does not need to prove the criminal elements of theft."

(4) Notwithstanding the denial to Petitioner of any opportunity to refute the theft charge, agency officials have freely branded Petitioner as a thief

in their conversations and circulated documents. See, 16 June 1986 testimony of Paul Britt, Tr. 148-149; also Pl. Ex."10", Report of Arthur L. Staden, p. 4, Id.,

> " ... Dr Hill did steal personal files ... [and] he did steal services from the government ..."

b. Respondent has also claimed,

> "[Dr Hill] did not dispute that he had misused government telephone service."

Petitioner positively denied the misuse charge and produced documents, affidavits, regulations, and testimonies of other employees showing that unofficial use of the telephones and other equipment was routinely permitted. The MSPB Decision, supra, at TAB 57, pp. 5-8, states,

> "... [A]ppellant stated that the former DAS Director, COL Paul Vallerie, gave blanket approval for the use of the agency's telephone service. Appellant also claimed that Britt gave specific authority to use the telephone service.

> ... I am not persuaded by this defense. ...
>
> Appellant's second defense was that Britt used the Autovon service for personal calls on an extensive basis.
>
> ... I am not persuaded that Britt's conduct can excuse appellant's, even though Britt was the proposing official."

c. Respondent's claim that

> " ... [T]he Air Force determined that petitioner was untrustworthy and suspended his top secret security clearance ..."

is also false. The District Court has found that it was Paul S. Britt, and not the agency which acted. Pet. App. p. 7,

> "In retaliation for Plaintiff's charges Colonel Britt revoked Plaintiff's security clearance on May 24, 1985, asserting that the revocation was in the interest of national security and ... established a special security file on Plaintiff ... " [Emphasis added.]

d. Respondent is apparently attempting to downplay the severe damages

Petitioner has endured, by its claim that the "Z Code" indicates that the agency might possess information pertinent to Petitioner's suitability, and by claiming that the District Court concluded that the Air Force may have treated Petitioner arbitrarily. What the Court actually found (Pet. App. p. 9) is that

> " ... the 'Z code' indicates that Plaintiff has left the employ of the agency and that the agency possesses derogatory data regarding Plaintiff's suitability for a security clearance; that the 'Z code' has damaged Plaintiff and precluded his employment in the defense community although Plaintiff's capabilities are in demand."
>
> "The Court's preliminary findings also support that Plaintiff was treated in a purposefully discriminatory and arbitrary fashion, with a stated intent to "get" the Plaintiff. Such conduct would not be rationally related to legitimate government purposes and implicates a violation of equal protection." Id., p. 29.

2. Respondent has argued in its Opposition that the recent decision in Webster v. Doe, S. Ct. No. 86-1294 (decided 15 June 1988) is not controlling herein. However, the conflict between the Tenth Circuit decision regarding constitutional rights and the Supreme Court holdings in Webster could not be more obvious.

a. The gut issue of this petition is entitlement to District Court review under fifth amendment claims of denial of due process and equal protection of the law, following exhaustion of adminisministrative remedy. On the basis of adduced facts, the District Court found

> "Plaintiff's work opportunities have been severely limited by a fact determination which failed to comport with the traditional ideas of fair procedure; and that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance." Pet. App. p. 12.

Upon the limited remand the Court held,

> "The Court finds that Plaintiff has alleged cognizable liberty and property interests under the due process clause that are independently deserving of protection. ... The Court further finds that Plaintiff has presented a colorable claim that the suspension of his access to classified materials infringed on a liberty interest. The government's placing of Plaintiff's security file in an unadjudicated or incomplete status and disseminating such information impugn the Plaintiff's standing and reputation and limits his ability to secure employment." Id., p. 28-29.

With regard to potential for administrative relief the District Court found,

> " ... that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation." Id., p. 7.

> "[I]t is the Court's understanding that the Merit Systems Protection Board, who entertained Plaintiff's appeal of the removal decision, declined to review the security clearance issues." Id., p. 27.

b. The Tenth Circuit did not regard the factual findings as being arbitrary, but rather decided that any relief available to Petitioner was foreclosed by Federal Circuit review of the MSPB administrative process (which excluded security issues), and held (Id., pp. 51-52),

> "The findings of the MSPB were upheld on appeal and are conclusive and binding on us, Hill, and the Air Force."

Regarding Petitioner's claim of jurisdiction of the unresolved security matter on constitutional grounds, the Circuit Court concluded (Id., p. 54),

> "We hold that no jurisdiction was conferred on those grounds.
>
> To summarize, the district court improperly based its jurisdiction upon constitutional grounds ..."

c. However, the Webster decision has reinforced the Supreme Court's steadfast position that constitutional

rights are a proper jurisdictional basis for equitable relief, notwithstanding provisions of the National Security Act, and even though review under the Administrative Procedure Act ("APA") is precluded by provisions of that statute. See, Webster, slip opinion, at p. 8; pp. 10-11,

> "Nothing in § 102(c) [of the National Security Act of 1947] persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the [CIA] Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court. ...
>
> ... [T]he District Court should thus address respondent's constitutional claims and the propriety of the equitable remedies sought."

d. The Tenth Circuit decision is defective in terms of the standard set by the Supreme Court at p. 10 of Webster,

> "We emphasized in Johnson v. Robinson, 415 U.S. 361 (1974), that where Congress

> intends to preclude judicial review of constitutional claims its intent to do so must be clear. Id., at 373-374. In Weinberger v. Salfi, 422 U.S. 749 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n.12 (1986)."

The Tenth Circuit Order has not addressed Congressional intent and precludes the District Court from considering involved statutory and constitutional issues.

(1) Petitioner has alleged (District Court Dkt. No. 28) that the action was taken under the provisions of 5 U.S.C. § 7532, i.e., the National Security Act. In Answer (Id., Dkt. No. 38), the Respondent has denied the allegation, but has anomalously claimed that the adverse security action was totally inde-

pendent of the action taken under provisions of 5 U.S.C. § 7512. See, generally Cole v. Young, 351 U.S. 536 (1956).

(2) The Circuit Court has also denied Petitioner any opportunity to show his expectation of security procedure under the circumstances. Petitioner has claimed that the norm is de-briefing, and not adverse an security action. See, Perry v. Sindermann, 408 U.S. 593, 601 (1972),

> "We have made clear in Roth, [408 U.S. 564 (1972)], at 571-572, that 'property' interests subject to procedural due process protection are not limited by a few rigid technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings' Id., at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

3. Respondent's vacuous assurance that any adverse impact on Petitioner's present security clearance will be subject to extensive 32 C.F.R. 155 procedural safeguards before the federal DISCO is anomalous. These are, in fact, the same procedures which are guaranteed by AFR 205-32, but have been denied to Petitioner. If the Appellate Court Order is not reversed, 32 C.F.R. 155 procedures will be denied under this same argument, i.e., that preclusive effect must be given to the MSPB decision, which allegedly "fully adjudicated" the matter.

Wherefore, Petitioner prays that the Court will not be insensitive to his constitutional right of equitable relief, and will summarily reverse the Circuit Court Judgment on the authority of Webster v. Doe.[1/] In the alternative, the Court should grant certiorari since the Tenth Circuit decision is in conflict

with other Appellate Court decisions, and has also decided the issue of the extent of due process rights in security clearance procedures. [2], [3]

Respectfully submitted,

Thomas W. Hill

Thomas W. Hill, Pro Se

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[1] On 31 July 1988, on the basis of the Webster decision, Petitioner submitted a second petition for rehearing to the Tenth Circuit accompanied by a motion for leave to file the same. See, Alphin v. Henson, 552 F.2d 1033 (4th Cir. 1977), cert. denied, 434 U.S. 823. As of the date of this Reply Petitioner has not received a response to the submission.

[2] Contrary to the Tenth Circuit decision there is nothing in Dept. of the Navy v. Egan, S.Ct. No. 86-1552 (23 Feb. 1988), which sanctions agency violations of its own regulatory procedural process, or permits waiver because of inability to restore the status quo ante. Respondent is in fact arguing that Petitioner's constitutional rights are "a matter of no continuing importance".

[3] As stated in the Petition, the gravamen of this matter is not the dissolution of the preliminary injunction (as misstated by Respondent), but rather the mandate to dismiss with prejudice a well-pled constitutional cause.

DECLARATION OF SERVICE

Pursuant to the provisions of 28 U.S.C. § 1746, I hereby declare service of the foregoing reply on the opposing parties by first-class mailing of true copies to:

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